5-25-1976

Kentucky Association of Chiropractors, Inc. v. Jefferson County Medical Society, et al

Appellant's Brief 1976-SC-0404

APPELLANT'S BRIEF

549 S.W.2d 817 4047

SUPREME COURT OF KENTUCKY

FILE NO. 76-404

KENTUCKY ASSOCIATION OF CHIROPRACTORS, INC. ..... APPELLANT

V.

JEFFERSON COUNTY MEDICAL SOCIETY, ET AL ..... APPELLEES

APPEAL FROM JEFFERSON CIRCUIT COURT
CHANCERY BRANCH, DIVISION NO. 5
HONORABLE EARL O'BANNON, JR., JUDGE

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BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

This is an appeal frm a Summary Judgment entered in the Jefferson Circuit Court, Chancery Branch, Fifth Division, on December 22, 1975 which is incorporated and amended by the Court's Judgment of January 27, 1976. (Record on Appeal, pp. 220-221, 232-236; hereinafter referred to as R.).

This action was filed by International Clinical Laboratories of Kentucky, Inc. (hereinafter referred to as ICL), a duly licensed medical laboratory, and Malcolm

L. Barnes, M.D., who is the Director of ICL. The event which precipitated the filing of this action was a letter and copies of articles which were to be published in the Jefferson County Medical Society *Bulletin*. The plain meaning of these documents was to accuse Dr. Barnes of breaching the Principles of Medical Ethics by performing certain laboratory tests for the Kentuckiana Center for Education, Health and Research (hereinafter referred to as "Center"). Dr. Barnes and ICL sought a declaration of rights as to their duties to the Center and to the public in making its services available to the Center.

Dr. Barnes and ICL joined as Respondents the Appellees, Jefferson County Medical Society, Commonwealth of Kentucky, Department of Human Resources, Bureau of Health Services, the Kentucky State Board of Medical Licensure, the Kentucky State Board of Chiropractic Examiners, and the Center.

The Appellees, Jefferson County Medical Society, the Bureau of Health Services and the Kentucky State Board of Medical Licensure filed joint pleadings throughout the proceedings below. In their joint answer, these Appellees admitted that the declaration of rights would be the appropriate remedy. These Appellees also filed a Counterclaim against Dr. Barnes and ICL and a Crossclaim against the Center and the Kentucky State Board of Chiropractic Examiners. In this combined Counterclaim and Cross-claim, these Appellees maintained that doctors of chiropractic are neither authorized by law nor qualified to collect human specimens from a patient or to use the findings of a medical laboratory based on the submitted specimen "for the purpose of obtaining information and

diagnosing, preventing or treating diseases, nor to give health advice". (R, p. 14, ¶10). Accordingly, these Appellees requested the trial court to prohibit ICL or other medical laboratories from accepting human specimens from doctors of chiropractic.

On the basis of these issues, this Appellant, the Kentucky Association of Chiropractors, Inc. (hereinafter referred to as KAC) intervened alleging that doctors of chiropractic are authorized by law and are qualified to transmit human specimen to medical laboratories for examination and to receive and interpret the results as contained in a medical laboratory report. Additionally, the KAC alleged that to construe Kentucky law in such a manner as to exclude doctors of chiropractic from using medical laboratories would be a deprivation of due process and equal protection of the laws as guaranteed in both the United States Constitution and the Constitution of Kentucky. (R., pp. 37-41).

A Pre-Trial Conference was held between the parties and the trial court and an order was entered by the Court ordering all discovery in this case to be completed within 90 days. (R., p. 44). In accordance with the above order, the KAC took depositions of eight witnesses within the discovery period. No discovery was taken by any other party to this action.

After the period for discovery had expired, motions for summary judgment and supporting briefs were filed by the Center, by the Appellees, Jefferson County Medical Society, Bureau of Health Services and the Kentucky State Board of Medical Licensure, and by the Appellant

KAC. An amicus curiae brief was submitted by the Kentucky Chiropractic Society in support of the Center's motion for summary judgment.

On December 22, 1975, the trial court entered a Judgment and Opinion granting a Summary Judgment in favor of the Appellees, Jefferson County Medical Society, Bureau of Health Services, and the Kentucky State Board of Medical Licensure. Upon the motion of the Appellant KAC an Amended Judgment was entered on January 27, 1976. In these judgments, the trial court ruled that doctors of chiropractic are not authorized by law to transmit human specimen to medical laboratories for examination and are not authorized to use the findings of a medical laboratory within the meaning of the applicable Kentucky statutes. In its opinion, the Court also stated that by prohibiting doctors of chiropractic from using medical laboratories was not a denial of due process or equal protection. (R., p. 219, ¶10). For these reasons, the Court ruled that ICL and Dr. Barnes may not accept human specimen from the doctors of chiropractic at the Center and the doctors of chiropractic at the Center may not collect human specimen and submit them to ICL or any other medical laboratory.

ARGUMENT

I.

THE CIRCUIT COURT ERRED IN FINDING THAT DOCTORS OF CHIROPRACTIC ARE NOT EXPRESSLY AUTHORIZED BY LAW TO USE THE FINDINGS OF MEDICAL LABORATORY EXAMINATIONS.

During the proceedings below, the trial court was

requested by the parties to interpret the following statutes:

KRS §333.150. HUMAN SPECIMENS TO BE EXAMINED ONLY ON REQUEST OF AUTHORIZED PERSONS.

A medical laboratory shall examine human specimens only at the request of a licensed physician, podiatrist, dentist, or other person authorized by law to use the findings of medical laboratory examinations. The results of a test shall be reported directly to the licensed physician, dentist, or other person who requested it.

KRS §333.160. WHO MAY COLLECT HUMAN SPECIMENS.

Only a licensed physician, dentist or other person authorized by law shall manipulate a patient for the collection of specimens, except that qualified personnel authorized by him may collect human blood or materials for smears or cultures.

In interest of brevity and avoiding the repetitive references to KRS §333.150 and KRS §333.160, the phrase "authorized to use medical laboratory findings" as used by the Appellant KAC shall include both the collection of human specimen as provided for in KRS §333.150 and the findings received from the examination as set forth in KRS §333.160.

It is the position of this Appellant that pursuant to the above statutes the doctor of chiropractic is allowed to use the findings of a medical laboratory. The Appellant KAC is by no means claiming that a doctor of chiropractic is a physician, dentist or podiatrist. The KAC is simply asserting that a doctor of chiropractic is an "other

person authorized by law" within the meaning of the above statutes.

By inserting the phrase "other persons authorized by law" in the above statutes, the General Assembly obviously intended to include persons other than those specifically named in the statute. The essential question in this appeal is whether doctors of chiropractic are "other persons atuhorized by law" within the meaning of these statutes. The KAC submits that doctors of chiropractic are "other persons" due to the express authorization they have received.

Doctors of chiropractic have received express authorization to use the findings of a medical laboratory examination pursuant to a regulation duly promulgated by the Kentucky State Board of Chiropractic Examiners. The regulation provides:

> Chiropractors may examine, analyze and diagnose the patient and his diseases by the use of any physical, chemical, or thermal method reasonably appropriate to the case. Chiropractors qualified by training and skill for diagnosis and analysis of patients by use of radiographs, blood analysis or other methods of examination may utilize the services of persons authorized by law to perform the procedures involved in such methods of examination. Provided, however, that the Board may upon notice and hearing find any licensee unfit to use specified methods of examination, and provided further that the board by duly promulgated regulations may prohibit or restrict use of specified methods of exa-

mination which the board determines are appropriately so regulated. K.A.R. 21: 020, §3.

This regulation was submitted to the Legislative Research Commission for review in accordance with KRS §13.085 on May 15, 1975. The Administrative Regulation Review Subcommittee approved this regulation on July 3, 1975, thereby affirming the Legislative Research Commission's finding that this regulation conformed to the statutory authority under which is was promulgated.

At the time this case was submitted to the trial court, this regulation was in effect. After the Appellees, Jefferson County Medical Society, Bureau of Health Services, and the Kentucky State Board of Medical Licensure, had filed their motion and supporting brief for summary judgment, they learned of the existence of this regulation by reading the brief filed by the Center. These Appellees then filed an Amended Cross-Claim and Counterclaim requesting the trial court to declare that this regulation was void and of no effect. (R., pp. 167-179). In its Judgment, the trial court declared that this regulation was void and had no effect because it was "inconsistent with the provisions of KRS 312.015 to 312.185, governing the practice of chiropractic . . ." (R., p. 218). The Appellant KAC promptly filed a motion to amend the judgment as it pertained to this regulation requesting the court to include a finding as to what portions of the regulation are inconsistent with the statutes governing the practice of chiropractic and for what reason the regulation was inconsistent with these statutes. (R., p. 229). In its amended judgment, the trial court refused to amend the original judgment stating that "the judgment entered herein has

already defined the inconsistent provisions of the referenced regulations, and accordingly, no amendments to the findings are necessary at this time." (R., p. 233).

It is the general rule in Kentucky that administrative regulations properly filed and adopted have the same effect as statutes directly enacted by the General Assembly from which the administrative agency is delegated its authority. *Rietze* v. *Williams,* Ky., 458 S.W.2d 613 (1970). However, the regulations adopted by any state agency must be confined to the function that the agency is authorized to administer. This proposition was discussed in *Courtney* v. *Island Creek Coal Company,* 474 F.2d 468 (6th Cir. 1973), and later enacted into law by the 1974 General Assembly.[1] KRS §312.075 grants the Board rule-making power relative to governing the practice of chiropractic as long as the rules promulgated by the Board are not inconsistent with the provisions of the statutes pertaining to chiropractic.

The trial court failed to specify which provisions of the regulation were in conflict with the statutes governing chiropractic. The trial court also refused to state its reasons in support of its ruling. After reading the statutes applicable to chiropractic, one discovers that the

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[1] KRS §13.082 UNIFORMITY OF POWER TO ADOPT REGULATIONS — REPEAL OF CONFLICTING PROVISIONS.

(1) The power vested in every administrative body to adopt regulations shall be uniform and shall be confined to the direct implemenation of the functions and duties assigned to an administrative body by the gneral assembly, or by executive order.

only statute with which the regulation could be in conflict is KRS §312.015(2) which provides:

> "Chiropractic" means the science of locating and adjusting the sublaxations of the articulations of the human spine and its adjacent tissues.

Comparing this provision with the regulation, it is difficult to find the inconsistency about which the trial court is referring. Perhaps the trial court thought that since the statute did not specifically say that doctors of chiropractic could diagnose, then they could not use diagnostic methods such as medical laboratory findings. However, the 1976 General Assembly removed any basis for this rationale when it enacted House Bill 758 which amended the definition of chiropractic to the science of "diagnosing and adjusting."[2]

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[2] House Bill 758 was passed by the General Assembly and signed by the Governor on March 30, 1976 and will bcome effective on June 19, 1976. Section 1, which amended KRS §312.015, provides as follows:

As used in this Chapter, unless the context otherwise requires:

(1) "Board" means the Kentucky state board of chiropractic examiners;

(2) Subject to the limitations of subsection (4) of this section "chiropractic" means the science of diagnosing and adjusting the sublaxations of the articulations of the human spine and its adjacent tissues;

(3) Subject to the limitations of subsection (4) of this

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The cases cited by the trial court in its Opinion in support of its ruling pertain only to those situations where an administrative body attempted to adopt regulations which were not within the authority delegated to it by the legislaure and/or which involved an administrative body trying to add to or take away from the requirements of a statute.

This is not the situation in the present case. KRS §312.075 gives the Board the power to make rules and regulations governing the practice of chiropractic. The regulation as passed by the Board is limited solely to the practice of chiropractic. Furthermore, there is no statu-

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section "chiropractor" means one qualified by experience and training and licensed by the board to diagnose his patients and to treat those of his patients diagnosed as having diseases or disorders relating to sublaxations of the articulations of the human spine and its adjacent tissues by indicated adjustment of those sublaxations and by applying methods of treatment designed to augment those adjustments. The terms "chiropractic", "doctor of chiropractic" and "chiropractor" shall be synonymous, and shall be construed to mean a practitioner of chiropractic as defined in this section.

(4) The practice of chiropractic does not include the practice of medicine or osteopathy as defined in KRS 311.550, the practice of podiatry as defined in KRS 311.380, the practice of dentistry as defined in KRS 313.010, the practice of optometry as defined in KRS 320.210, the practice as a nurse as defined in KRS 314.011, or the practice of pharmacy by persons licensed and registered under KRS 315.050.

tory provision specifying what means a doctor of chiropractic may utilize in diagnosing his patients even though the new amendment to these statutes specifically provides that a doctor of chiropractic may diagnose. In this regulation, the Board is merely listing the methods the doctor of chiropractic may utilize in diagnosing his patients. The Board is not adding to the statutory provisions (i.e., giving doctors of chiropractic the *right* to diagnose) but is merely "filling in the necessary details" which were omitted by the General Assembly (i.e., the means chiropractors may use to diagnose).[3]

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[3] The "filling in the details" standard has been used by both federal and state courts to uphold the validity of regulations promulgated by an administrative agency since the Supreme Court's decision in US v. **Grimaud,** 220 US 506, 31 S. Ct. 480, 55 L. Ed. 563 (1911). The "filling in the details" standard has also been used by the Kentucky Courts in upholding the actions of an administrative agency in **Ashland Transfer Company** v. **State Tax Commission,** 247 Ky. 144, 56 S.W. 2d 691 (1932). The standard was also mentioned in **Union Light, Heat & Power Company** v. **Public Service Commission,** Ky., 271 S.W. 2d 361, 365 (1954).

It appears that the Kentucky Court of Appeals has stopped relying entirely on the "standards" approach to judicial review of administrative regulations and has adopted the "safeguards" approach as an additional consideration. See, **Holsclaw** v. **Stephens,** Ky., 507 S.W.2d 462 (1973) and **Butler** v. **United Cerebreal Palsy of Northern Kentucky, Inc.,** Ky., 352 S.W.2d 203 (1961).

It appears that the chief reason for the court's adoption of the "safeguards" approach is that the General Assembly is in session for only 60 days every two years which makes it

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The Board has adopted a regulation pursuant to its rule-making power which has been duly promulgated through the administrative law machinery. The regulation is not inconsistent with the provisions of the chiropractic statute. Furthermore, the regulation does not seek to add to the statute but is merely filling in the details that the legislature omitted. Since the regulation has been duly promulgated by a Board with rule-making power pursuant to its delegated authority, the regulation passed by the Board is valid and must be upheld by this Court.

ARGUMENT

II.

THE CIRCUIT COURT ERRED IN FINDING THAT DOCTORS OF CHIROPRACTIC ARE NOT AUTHORIZED BY IMPLICATION TO USE MEDICAL LABORATORY FINDINGS.

In addition to being expressly authorized by law to use medical laboratory findings, doctors of chiropractic are also legally authorized by implication to use these findings. This implied authorization is derived by applying the judicial rules of statutory construction to both newly enacted and existing statutes.

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virtually impossible for the General Assembly to set sufficient standards in its legislative enactments to guide administrative agencies' ruling-making power. As stated by Justice Palmore, "They [the General Assembly] has neither the time, facilities, nor qualifications to do more than indicate the class and fix the amount spent." **Butler, supra,** at 208.

Statutory law is an expression of the will of the General Assembly. When a Court is faced with interpreting a statute, it must determine what the General Assembly intended by enacting this statute as well as the purpose behind the statute. *May* v. *Clay-Gentry-Graves Tobacco Warehouse Co.,* 284 Ky. 502, 145 S.W.2d 84 (1940). It is a general rule that the best method in ascertaining the legislative intent is to look to the plain language used in the statute. *Gateway Construction Co.* v. *Wallbaum,* Ky., 356 S.W.2d 247 (1962). The words of the statute are to be given their usual, ordinary and everyday meaning. *Thompson* v. *Bracken County,* Ky., 294 S.W.2d 943 (1956). Where the language of the statute is clear and unambiguous and expresses the intent of the legislature, then the statute must be interpreted by the Court as it is written. *Griffin* v. *City of Bowling Green,* Ky., 458 S.W.2d 456 (1970). In such a case, the Court cannot ignore the plain meaning of the statute and interpret it differently even though another meaning may be more preferable. *Board of Education of Nelson County* v. *Lawrence,* Ky., 375 S.W.2d 830 (1964).

In light of these legal principles, it is apparent that the phrase "other persons authorized by law" would not have been included in the statute if the legislature did not intend for someone other than a doctor, dentist or podiatrist, to use these facilities. This phrase is not, in and of itself, ambiguous. Its plain and everyday meaning is that persons, in addition to those specifically named in the statute, who are authorized by law may use laboratory findings. A "law" may be statutory, or it may be by judicial decision, or it may be by administrative rule or regu-

lation. Therefore, if a person is authorized by statute, case law or administrative regulation to use the findings of a laboratory, then that person would be authorized by law within the meaning of KRS §333.150.

The Kentucky Court of Appeals has stated in previous decisions that in addition to expressed powers set forth in a statute, powers that are necessary or incident to the accomplishment of the thing expressly authorized are implied by law. *Dodge* v. *Jefferson County Board of Education,* 298 Ky. 1, 181 S.W.2d 406 (1944); *Long* v. *Mayo,* 271 Ky. 192, 111 S.W.2d 633 (1937). In *Folks* v. *Barren County,* 313 Ky. 515, 232 S.W.2d 1010, 1014 (1950), the Court of Appeals while interpreting a statutory provision stated that "where the end is expressly given, the means necessary to the effectuation of that end are given by implication."

Chapter 312 of the Kentucky Revised Statutes governs the health profession of chiropractic. By the express terms of this Chapter, chiropractic is a separate and distinct health profession regulated by its own board of examiners. The provisions of Chapter 312 were reorganized and amended by the 1976 General Assembly and these revisions will become effective June 19, 1976. The revisions, which are relevant to the interpretation of KRS §333.150, are contained in §1(2) and 1(3) of House Bill 758 which amended KRS §312.015 to read as follows:

> (2) Subject to the limitations of subsection (4) of this section "chiropractic" means the science of diagnosing and adjusting the sublaxations of the

articulations of the human spine and its adjacent tissues;

(3) Subject to the limitations of subsection (4) of this section "chiropractor" means one qualified by experience and training and licensed by the board to diagnose his patients and to treat those of his patients diagnosed as having diseases or disorders relating to sublaxations of the articulations of the human spine and its adjacent tissues by indicated adjustment of those sublaxations and by applying methods of treatment designed to augment adjustment of those sublaxations and by applying methods of treatment designed to augment those adjustments.

These amendments clearly give doctors of chiropractic the right to diagnose their patients prior to treatment. However, the General Assembly has neither prescribed nor prohibited the methods the doctor of chiropractic could utilize in reaching this diagnosis. In view of the *Dodge, Long & Folks* cases cited above, the end expressly given to the doctor of chiropractic is the right to diagnose his patient and the means he must use to reach his diagnosis are implied by law since the legislature has chosen not to set forth these methods.

One of the functions of a medical laboratory is to provide information to be used in diagnosing a patient's condition. KRS §333.020(3). As stated by several of the KAC's witnesses, medical laboratory findings are one of several necessary diagnostic techniques that a doctor of chiropractic often must rely on in reaching a diagnosis. (See depositions of Dr. Gustave Dubbs, pp. 20-21, 29;

Dr. Ronald Paul Biedeman, pp. 27-28; Dr. Gary Johnson, pp. 17-23). Therefore, in light of the fact that a medical laboratory is to furnish information for diagnostic purposes, together with the fact that a doctor of chiropractic is authorized by law to diagnose, and the means necessary to assist doctors of chiropractic in reaching his diagnosis are implied by law, then a doctor of chiropractic is an "other person authorized by law" to use the laboratory findings within the meaning of KRS §333.150.

One further point in this regard is that the General Assembly has not chosen to prohibit the doctor of chiropractic from using any specific diagnostic method. On the other hand, with regard to the treatment phase of the practice of chiropractic, the legislature has expressly prohibited the doctor of chiropractic from using certain methods of treatment as well as treating certain diseases. House Bill 758, Section 2. If the General Assembly had intended to restrict the means which a doctor of chiropractic could use in formulating his diagnosis, then it would seem that the General Assembly would have specifically enumerated the prohibited methods as it did with regard to the treatment aspect of chiropractic.

Another statute which lends support to the KAC's position is KRS §312.190 which authorizes doctors of chiropractic to sign death certificates and other legal documents. KRS §312.190 provides:

> **KRS §312.190 CHIROPRACTOR MAY SIGN DEATH CERTIFICATES AND OTHER LEGAL DOCUMENTS.**
>
> Any person licensed under this chapter may sign death certificates and sign and execute all legal docu-

ments and certificates with the same authority as members of other schools or systems of treatment.

The only other schools or systems of treatment that are authorized by statute to sign death certificates are physicians (KRS §213.080) and dentists (KRS §313.250). KRS §213.080, which contains the requirements for death certificates, provides as follows:

> (2) The medical certificates shall be made and signed by the physician, if any, last in attendance on the deceased, who shall specify the time in attendance, the time he last saw the deceased alive, and the hour of the day at which death occured. He shall further state the cause of death, showing the course of disease or sequence of causes resulting in death, giving the primary cause and any contributory causes, and the duration of each. Indefinite and unsatisfactory terms, indicating only symptoms of disease or conditions resulting from disease, will not be sufficient for issuing a burial or removal permit. Any certificate not containing the terms defined by the division of vital statistics shall be returned to the physician for correction and definition. Where death may be the result of either disease or violence, the causes shall be carefully defined, and if the result of violence its nature shall be stated, and whether it appears to have been accidental, suicidal, or homicidal. In case of death in hospitals, institutions or away from home, the physician shall furnish the information required in this section and shall state where, in his opinion, the disease was contracted.

There are occasions when the doctor of chiropractic,

or any other attending physician, may need to use the findings of a medical laboratory in order to provide the information as required in the above section. Since the General Assembly expressly gave doctors of chiropractic the authority to sign death certificates and, since the use of laboratory findings is necessary in many instances to perform this duty, then the General Assembly has given doctors of chiropractic implied authorization to use the findings of a medical laboratory. *Folks* v. *Barren County,* 313 Ky. 515, 232 S.W.2d 1010 (1950); *Dodge* v. *Jefferson County Board of Education,* 298 Ky. 1, 181 S.W.2d 406 (1944); *Long* v. *Mayo,* 271 Ky. 192, 111 S.W.2d 633 (1937).

In response to the Appellant KAC's position, the trial court ignored the provisions of KRS §213.080, §213.090. The Court cited KRS §§72.070, 72.080, and 72.210 for the proposition that the authority to sign death certificates cannot be construed to permit doctors of chiropractic to use medical laboratory findings. (R., p. 217 ¶7).

Apparently the trial court either misunderstood the Appellant KAC's position or misinterpreted the structure of the statutes relating to death certificates. KRS §213.090 applies to the situation where a person died without a physician (or doctor of chiropractic, by reason of KRS §312.190) in attendance. When a person dies without a physician, dentist or doctor of chiropractic in attendance, the undertaker is to give notice to the local health officer who shall investigate the death prior to issuing the burial permit. KRS §213.090(1).

If the local health official finds that it was probable

that the death was caused by a crime, suicide or by drowning, or by another sudden cause, or if the death occurred without the attendance of a physician (doctor of chiropractic or dentist) at any time during the 36 hours immediately prior to death, then the case is referred to the coroner for investigation. KRS §213.090(1). When the case is referred to the coroner for investigation, then the provisions of Chapter 72 of the Kentucky Revised Statutes become operative. KRS Chapter 72 sets forth the duties of the coroner and restricts his duties only to those cases where the death is due to unnatural causes (crime, suicide, drowning or other sudden cause) without the attendance of a physician within a period of 36 hours prior to death. KRS §72.030.

In such cases, it becomes the duty of the coroner to investigate the death. As part of the inquest, the coroner may request a post-mortem examination, which may include an autopsy to be performed by a physician or surgeon. KRS §72.070. In instances where a body is exhumed, the coroner also has authority to hire a competent physician or surgeon. To assist the coroner, the medical examiner and post-mortem examination section of the State Department of Health was created by the General Assembly to provide post-mortem examinations to coroners at no charge. KRS §72.210, *et. seq.*

The trial court found that a doctor of chiropractic is not permitted to use the findings of a medical laboratory when preparing a death certificate after considering only those statutes which relate to post-mortem examinations. The Court completely ignored the provisions of the statutes relating to death certificates. The Court also failed

to point out that KRS Chapter 72 does not apply in every situation as does KRS §213.080. Chapter 72 only applies where a person dies of unnatural causes without an attending physician. It may well be that the General Assembly intended to exclude doctors of chiropractic from being employed to perform post-mortem examinations, which often include autopsies. The reason for this exclusion is that the practice of chiropractic does not include performing surgery or autopsies.

If the legislature intended to restrict the doctor of chiropractic from using laboratory findings, then it would not have given him the authority and responsibility to sign death certificates which can only be completed by a person who is trained in diagnosis and has at his disposal the necessary techniques to supply the required information. Such a grant of authority by the legislature affirms its recognition of the fact that doctors of chiropractic have the qualifications necessary to determine one's cause of death and the ability to utilize the necessary diagnostic techniques, including medical laboratory findings.

ARGUMENT

III.

THE CIRCUIT COURT ERRED IN FINDING THAT THERE IS NO DENIAL OF DUE PROCESS OF LAW BY PROHIBITING DOCTORS OF CHIROPRACTIC FROM USING MEDICAL LABORATORY FINDINGS.

Section 1 of the Fourteenth Amendment to the United States Constitution provides that "No state shall make or enforce any law which shall . ... deprive any persons

of life, liberty or property without due process of law."[4] It has been generally recognized that although due process is not a readily definable term, it does nevertheless, have a dual aspect. *Poe* v. *Ullman,* 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

The first aspect of due process is referred to as "procedural due process." Procedural due process guarantees every person the right to receive adequate notice of any judicial proceeding against him and in addition the opportunity to be heard at that proceeding. *Morrissey* v. *Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Boddie* v. *Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). The Appellees, Jefferson County Medical Society, Bureau of Health Services and the Kentucky State Board of Medical Licensure argued below that due process has been satisfied in this case because the Appellants were given notice of the proceedings and were actually being heard by this Court. The Appellants agree with that argument as it pertains to procedural due process but not as to the second aspect of due process.

The second aspect of due process is "substantive due process". Substantive due process protects every person

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[4] A corresponding provision guaranteeing due process of law is contained in Section 2 of the Kentucky Constitution which provides:

> "Absolute and arbitrary power over the lives, liberty and property of freemen exists no where in a republic, not even in the largest majority."

against action on the part of a state which deprives that person of his life, liberty, or property for arbitrary reasons. *Poe* v. *Ullman, supra*; *Goss* v. *Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Hurtado* v. *People of California,* 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884).

The trial court found that there was no deprivation of life, liberty or property by prohibiting doctors of chiropractic from using medical laboratories. (R., p. 219, ¶10). It has been held by the United States Supreme Court that a state cannot, while claiming to protect the public, arbitrarily interfere with or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. Such action by a state is not only a deprivation of property but is also a deprivation of liberty. *Meyer* v. *Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Terrace* v. *Thompson,* 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255 (1923); *Adams* v. *Tanner,* 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336 (1917); *Traux* v. *Reich,* 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915).

The purpose behind KRS Chapter 333 is to protect the health and welfare of the people in Kentucky by requiring medical laboratories to provide reliable and competent information to health professionals. KRS §333.010. One of the functions of a medical laboratory is to provide information for diagnostic purposes. KRS §333.020(3). Even though the practice of medicine and chiropractic are separate and distinct health professions with regard to their respective theories of treatment, both professions *must diagnose* their patients before treating them. In many cases diagnostic information is obtained

from sources used by both professions. The foremost technical source used by both doctors of chiropractic and physicians is the x-ray. Yet, the trial court has interpreted KRS §333.150 to prohibit dotors of chiropractic from using medical laboratory findings for diagnostic purposes even though physicians may use them for the same purposes. This finding was made by the trial court in view of the uncontradicted evidence before the Court that doctors of chiropractic are qualified to use these findings and must use them to make an accurate diagnosis. (See depositions of Dr. Gustave Dubbs, pp. 20-21, 29, 31-33; Dr. Ronald Paul Biedeman, pp. 16-18, 26-28; Dr. Gary Johnson, pp. 16-22).

By ruling that doctors of chiropractic are not permitted to use medical laboratory findings ,the trial court has deprived the doctor of chiropractic from using a diagnostic technique which is vital to the practice of chiropractic. The doctor of chiropractic must have the means at his disposal to determine the nature of his patient's health as does any health professional who has the right to diagnose. To deprive the doctor of chiropractic the use of a medical laboratory for diagnostic purposes is such an unreasonable and arbitrary infringement upon the practice of chiropractic as to amount to a deprivation of liberty and property.

This deprivation is for no valid reason. The mere fact that physicians use medical laboratories for diagnostic purposes does not incorporate these facilities into the practice of medicine. Doctors of chiropractic are qualified to use these findings. Doctors of chiropractic

diagnose their patients as do physicians. In view of these facts, doctors of medicine and doctors of chiropractic should both be permitted to use these facilities for diagnostic purposes.

Furthermore, *the doctor of chiropractic's patient is entitled to have his health professional make the best diagnosis that he possibly can.* By restricting the doctor of chiropractic from using the findings of a medical laboratory denies the patient of that protection. An application of KRS §333.150 in this matter is in direct opposition to the express purpose of this chapter which is to protect and provide for the public's health ,safety and welfare.

The interpretation by the trial court is one that deprives the doctor of chiropractic the liberty to pursue his profession and permits the statute to make this prohibition for an arbitrary reason alone. Therefore, the trial court has applied this statute in a manner which denies doctors of chiropractic due process of law.

ARGUMENT

IV.

THE CIRCUIT COURT'S RULING THAT A DOCTOR OF CHIROPRACTIC MAY NOT USE MEDICAL LABORATORY FINDINGS IS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

The equal protection clause of the 14th Amendment to the United States Constitution provides that "No state shall . . . deny to any person within its jurisdiction the

equal protection of the laws."[5] The protection that the clause affords a person is that all persons who are similarly situated with respect to the purpose of a law shall be treated equally. *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989, (1920). In other words, with respect to legislation, the state may classify people into separate groups and treat these groups differently. The classification is valid if it rests upon some ground of difference having a fair and substantial relation to the purpose of the legislation so all persons similarly situated will be treated alike. *F. S. Royster Guano Co.* v. *Virginia, supra.*

Apparently, the trial court found that a reasonable classification was made by the General Assembly in KRS §333.150. (R. p. 219, ¶10).[6]

The General Assembly made reasonable classifications by separating the various health professionals into different groups and by enacting different statutes to

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[5] The corresponding provision in the Kentucky Constitution is Section 3 which provides:

"All men, when they form a social compact, are equal; and no grant of exclusive separate public emoluments or privileges shall be made to any men or set of men, . . ."

[6] For the purposes of this argument, this appellant is assuming a classification was actually made by th legislature between doctors of chiropractic and doctors of medicine in KRS §333.150. However, see Arguments I and II herein for the proposition that a classificaion was never actually made by the General Assembly or even intended.

govern each profession. On the other hand, a reasonable classification was not made by the General Assembly if it set aside medical laboratories for the exclusive use of some health professions where the members of another health profession are as qualified and need to use these facilities as much as the other professions. In other words, if the professions of medicine, dentistry, podiatry and chiropractic require the use of x-rays for diagnostic purposes and the members of these professions are qualified to use them, then the x-ray should be available for use by all professionals. The same should also be true for other facilities, such as medical laboratories.

The Kentucky General Assembly has established chiropractic as a separate and distinct profession for providing health care services in Kentucky. As such, chiropractic is a separate portal of entry into the health care system along with the other separate portals which include the schools of medicine, osteopathy, optometry, dentistry, pharmacy, etc. Being a separate portal of entry, a patient can walk into a doctor of chiropractic's office without having been referred by another health professional. In addition, *the doctor of chiropractic is authorized to diagnose* and adjust that patient according to the principles of chiropractic. By permitting the doctor of chiropractic to serve as a separate portal of entry, *the General Assembly has also given the doctor of chiropractic responsibility to diagnose* and treat the patient in a professional manner. The beneficiary of these chiropractic services is the consumer-patient who goes to the doctor of chiropractor's office for relief of his ailments.

In order to effectively inform the patient what is

wrong with him, *the doctor of chiropractic must reach a diagnosis.* His diagnosis will be the result of the utilization of certain diagnostic procedures. When the doctor reaches his diagnosis, he will be able to determine whether the patient can be treated by chiropractic or whether the patient must be referred to another health profession for relief.

Doctors of chiropractic, like any other health professional, should be encouraged to diagnose to the best of their professional ability. This should not only include specialized education and training, but should also include the availability of all diagnostic techniques which a doctor of chiropractic is capable of using. Since the General Assembly has indicated that it is in the best public interest for the doctor of chiropractic to provide health care in Kentucky, and to diagnose his patients, it also follows that it is in the best public interest to permit the doctor of chiropractic to use diagnostic techniques which would enable him to make a more accurate diagnosis. One such technique is the use of medical laboratory findings.

The testimony in this case establishes the fact that doctors of chiropractic are well educated and well qualified to use the findings of a medical laboratory. The proof also shows that such a technique is necessary to the practice of chiropractic. (See depositions of Dr. Gustave Dubbs, pp. 20-21, 29, 31-33; Dr. Ronald Paul Biedeman, pp. 5-9, 16-18, 26-28; Dr. Gary Johnson, pp. 8-22). The General Assembly has established chiropractic as a separate and distinct health profession in Kentucky's health care system. The General Assembly has also included diagnosis as part of the practice of chiropractic. In terms

of qualifications, necessity and the purpose for which these results are used, doctors of chiropractic are similarly situated with doctors of medicine, dentists and podiatrists in utilizing the findings of a medical laboratory.

The obvious purposes behind KRS 333.150 and 333.160 are that only qualified people should collect human specimen from a patient for the patient's protection and that the medical lab should report back to people qualified to interpret their report so that their findings will be properly applied. The ultimate purpose behind both of these statutes is to provide better health care for the public. It would be in the best public interest if doctors of chiropractic are allowed to use these findings since they are qualified health professionals and also because their patients are entitled to the best care possible as are patients of any health care professional.

Therefore, since doctors of chiropractic are similarly situated with doctors of medicine, dentists and podiatrists with respect to the purposes of KRS §333.150, and since the purposes of this act cannot be effectuated by excluding doctors of chiropractic, then the trial court's appliation of this law has served to deny doctors of chiropractic the equal protection of the laws.

CONCLUSION

The Appellant KAC is requesting this Court to interpret KRS §333.150 and KRS §333.160 to include doctors of chiropractic as "other persons authorized by law" to use medical laboratory findings for diagnostic purposes.

The first argument in support of this request is that

doctors of chiropractic have been authorized by law to use medical laboratory findings by an administrative regulation as adopted by the Kentucky State Board of Chiropractic Examiners. The trial court erred in holding that this regulation is void and outside the rule-making authority of the Board. This regulation is consistent with the statutory definition of the practice of chiropractic both at the time the trial court made its ruling and as amended by House Bill 758. This regulation is also within the express rule-making power of the Board both prior to and after the amendments made by House Bill 758. Furthermore, this regulation is confined to "filling in the necessary details" that the General Assembly had omitted.

This Appellant also urges the Court to consider the implied authorization that doctors of chiropractic have received by the General Assembly through other legislative enactments. KRS §§333.150 and 333.160 both set forth the types of persons who can collect human specimen and use medical laboratory findings. In addition to these persons, the General Assembly also provided that other persons authorized by law may use these findings as well. Thus, the General Assembly intended persons other than those named in the statutes to use medical laboratory findings.

The foremost source of implied authorization in behalf of doctors of chiropractic is KRS §312.015 which defines chiropractic as the "sciene of locating and adjusting". It was argued before the trial court by the Appellant KAC that locating meant diagnosing. The 1976 General Assembly, through House Bill 758, amended this provi-

sion by inserting "diagnosing" for the term "locating". Since doctors of chiropractic diagnose and since one of the purposes of medical laboratories provide diagnostic information, doctors of chiropractic have been impliedly authorized by the General Assembly to use medical laboratory findings. Therefore, doctors of chiropractic are "other persons authorized by law" with the meaning of these statutes.

Another source of authorization by implication is KRS §312.190 which gives doctors of chiropractic the duty to sign death certificates with the same authority as members of other health professions. There are occasions when medical laboratory findings are needed to provide the required information to be included in a death certificate. Since doctors of chiropractic have been given the duty to sign death certificates, and since the lab findings are often needed to obtain this information, it only follows that the General Assembly intended dotors of chiropractic to use the findings of medical laboratories. Thus, through KRS §312.190, doctors of chiropractic receive the legal authority to use these findings and are other persons authorized by law within the meaning of KRS §333.150 and KRS §333.160.

The third reason why this Court should reverse the trial court's interpretation of these statutes is because the trial court's application of the statutes is in violation of the due process clause. By prohibiting doctors of chiropractic from using medical laboratory findings, this state is depriving these doctors of liberty in the practice of their profession. It has been held by the Supreme Court on numerous occasions that the liberty in pursuing a lawful

profession is a constitutionally protected right. These cases have also held that this right cannot be interfered with by the state for arbitrary reasons.

In this instance, this state has no valid reason for depriving doctors of chiropractic of this liberty. The uncontradicted testimony before the Court is that doctors of chiropractic are qualified to use these findings and that these findings are necessary to them in pursuing their profession. The state legislature has stated that doctors of chiropractic must diagnose yet, the construction of the statutes by the trial court has stripped them of a vital diagnostic technique. The patient of a doctor of chiropractic also is entitled to have the doctor of chiropractic make the best diagnosis as possible. By prohibiting doctors of chiropractic from using medical laboratory findings, the patient will not receive the best chiropractic care that is available to him. This deprivation of liberty has been made by the trial court arbitrarily and for no valid reason and constitutes a denial of due process and must be corrected by this Court.

The fourth argument in support of this Appellant's position is that the trial court has denied the doctors of chiropractic the equal protection of the laws. Although the state has made reasonable classifications in separating the health professions, the trial court has not acted reasonably by refusing doctors of chiropractic the use of medical laboratories.

A classification is permissible in light of the equal protection clause if it is based upon a difference relating to the purpose of the statute so all persons similarly situated will be treated alike. By specifically including

doctors, dentists and podiatrists in these statutes, the General Assembly has recognized the need and ability of these persons to use these findings. Doctors of chiropractic also have the responsibility to diagnose and they possess the qualifications and training to use medical laboratories. The purpose behind the statutes is to provide better health care in Kentucky. The exclusion of doctors of chiropractic from the statutes defeats this purpose since patients of doctors of chiropractic will not be receiving the quality of health care that doctors of chiropractic are capable of rendering. Since doctors of chiropractic are similarly situated with persons named in the statutes and since the purpose of the statute will actually be defeated by the exclusion of doctors of chiropractic, the trial court's interpretation of the statutes serves to deny doctors of chiropractic the equal protection of the laws.

For these reasons this Appellant respectfully demands that the summary judgment of the trial court be reversed and that this court enter a summary judgment pursuant to the motion of this Appellant.

Respectfully Submitted,

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